

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DELBERT M. GREENE

Plaintiff,

vs.

DWIGHT NEVEN, et al.,

Defendants.

3:07-CV-00474-LRH-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

May 27, 2009

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for a preliminary injunction, styled "Affidavit of Plaintiff, Request for Injunction" (#27). Defendants opposed (#30). Plaintiff did not file a reply. The court has thoroughly reviewed the record and the motions and recommends that plaintiff's motion for a preliminary injunction (#27) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Delbert Greene ("plaintiff"), a *pro se* prisoner, is currently incarcerated at Ely State Prison ("ESP") in the custody of the Nevada Department of Corrections ("NDOC") (#11). Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983, alleging defendants violated his First, Eighth and Fourteenth Amendment rights against retaliation and cruel and unusual punishment and to equal protection and due process of the law while incarcerated at High Desert State Prison ("HDSP"). *Id.* Plaintiff names as defendants Dwight Neven, HDSP Warden, Claude Willis, Associate Warden of Programs at HDSP, E. Jenkins, former correctional officer at HDSP, Jeremy Bean, Jeffrey Walker, and Jeremy Jackson, senior correctional officers at HDSP.¹ *Id.*

¹The Office of the Attorney General accepted service for defendants Neven, Willis, and Baca on November 6, 2008 (#12), and for defendant Walker on December 5, 2008 (#17). The U.S. Marshall issued a summons to defendant Jackson on April 30, 2009 (#37), and he is now also represented by the Office of the Attorney General (#38). The U.S. Marshall's office was unable to

1 Plaintiff filed his first amended complaint on October 17, 2008, including three counts
2 of alleged constitutional violations. In count I, plaintiff alleges that defendants Neven and Willis
3 retaliated against plaintiff for exercising his First Amendment rights (#11). Plaintiff claims that
4 he was sexually harassed and assaulted by Officer E. Jenkins. *Id.* p. 4. He grieved and complained
5 to defendants about the incident. However, defendants Neven and Willis “conspired to cover up
6 a crime and refused to allow a higher authority to investigate a crime they enforce upon the
7 prisoners but refused to enforce upon their own; and allowed a predator to resign from his duties.”
8 *Id.* p. 6. Plaintiff claims that because he grieved the alleged assault, defendants Neven and Willis
9 retaliated against him by refusing to accept any of plaintiff’s subsequent grievances, and that
10 defendant Neven admitted to such retaliation. *Id.*

11 In count II, plaintiff alleges that defendants violated his Eighth Amendment rights by
12 forcing him to live in an unsanitary cell for seven months. *Id.* p. 7. Further, defendants retaliated
13 against plaintiff because of his use of the grievance system by “Jackson removing all personal
14 property [from plaintiff’s cell] to stop plaintiff from contacting outside help; C. Willis giving
15 special attention to Neven’s response on kite back to plaintiff; J. Walker giving plaintiff two years
16 in the hole with the threat of ‘no’ investigation and had plaintiff shipped to a maximum prison;
17 this all resulted in denied phone calls; store restriction before plaintiffs’ disciplinary hearing; legal
18 worked delayed and mail room searching for the documents of Warden Neven.” *Id.* Plaintiff again
19 claims that defendant Neven admitted that defendants retaliated against him. *Id.*

20 In count III, plaintiff alleges that Jenkins sexually harassed him on January 29, 2006, and that
21 defendant Neven failed to protect him from this harassment. *Id.* p. 8. Further, defendant Neven
22 deliberately tried to cover up the incident “by ignoring all grievances and refusing [to give]
23 plaintiff mental [health care].” *Id.* Plaintiff also states that he was denied psychiatric help
24 following the harassment. *Id.* p. 5. Plaintiff also claims violations of his Fourteenth Amendment
25 rights to due process and equal protection. However, it is unclear from the complaint exactly what
26

27 locate Officer E. Jenkins, and he was not served with plaintiff’s complaint (#36). The court issued
28 a 4(m) notice on May 22, 2009 (#39). Plaintiff was given until June 21, 2009 to file a proof of
service on Officer E. Jenkins; otherwise, he will be dismissed from this lawsuit.

actions defendants took to violate plaintiff's Fourteenth Amendment rights. *Id.* p. 8. Plaintiff also appears to again allege retaliation, stating that prison staff "continually searched" and "scattered" his legal papers after defendant Neven sent plaintiff a letter "admitting guilt," and that plaintiff sent these incriminating documents to someone outside of the prison. *Id.*

The court notes that the plaintiff is proceeding *pro se*. "In civil cases where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

II. DISCUSSION & ANALYSIS

A. Discussion

1. Preliminary Injunction Standard

The Prison Litigation Reform Act ("PLRA") states that

In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief...

18 U.S.C. § 3626(2).

The traditional equitable criteria for granting a preliminary injunction in the Ninth Circuit are: "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Johnson v. California State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). Alternatively, the moving party may demonstrate *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions going to the merits were raised and the balance of hardships tips sharply in his or her favor. *Johnson*, 72 F.3d at 1430 (emphasis added); *see also Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003). The Ninth

1 Circuit has stated that these alternatives represent “extremes of a single continuum” rather than
 2 two separate tests and thus, the “greater the relative hardship to [the party seeking the preliminary
 3 injunction,] the less probability of success must be shown.” *Clear Channel*, 340 F.3d at 813.

4 A prohibitory injunction preserves the status quo while litigation is pending, while a
 5 mandatory injunction provides preliminary relief well beyond maintaining that status quo.
 6 *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). Mandatory
 7 preliminary injunctions are disfavored, and “the district court should deny such relief ‘unless the
 8 facts and law clearly favor the moving party.’” *Id.* (quoting *Martinez v. Matthews*, 544 F.2d
 9 1233, 1243 (5th Cir. 1976). The “granting or withholding of a preliminary injunction rests in the
 10 sound judicial discretion of the trial court.” *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 325 F.2d
 11 141, 143 (9th Cir. 1964).

12 **B. Analysis**

13 Plaintiff requests the court enjoin defendants from harassing him and force defendants to
 14 transfer him to the “working housing unit” (#27, p. 1). He states that he has been in lockdown for
 15 twenty-eight months, although he was only sentenced to one year in disciplinary segregation. *Id.*
 16 Plaintiff claims that defendants are keeping him in “24 hour lockdown” as a means of retaliating
 17 against him for bringing sexual harassment charges against a correctional officer. *Id.* In the
 18 alternative, plaintiff requests the court order that he be transferred to Southern Desert Correctional
 19 Center. *Id.* p. 2.

20 **1. Likelihood of Success on the Merits**

21 To obtain a preliminary injunction, plaintiff must offer evidence that there is a likelihood
 22 he will succeed on the merits of his claim. *Johnson*, 72 F.3d at 1430. “Likelihood of success on
 23 the merits” has been described as a “reasonable probability” of success. *King v. Saddleback*
 24 *Junior College Dist.*, 425 F.2d 426, 428-29 n.2 (9th Cir. 1970).

25 **a. First Amendment Retaliation**

26 Prisoners have a right to meaningful access to the courts, and prison authorities may not
 27 penalize or retaliate against an inmate for exercising this right. *Bradley v. Hall*, 64 F.3d 1276,
 28 1279 (9th Cir. 1995). Prison officials may be sued under Section 1983 for retaliating against a

prisoner for exercising his or her constitutional rights. *Pratt v. Rowland*, 65 F.3d 802, 806 & n.4 (9th Cir. 1995). A retaliation claim involves five elements: “(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004).

Although an inmate alleging a retaliatory transfer has “no constitutionally-protected liberty interest in being held at, or remaining at, a given facility,” an inmate need not establish “an independent constitutional interest in...assignment to a given prison...because the crux of his claim is that state officials violated his *First Amendment* rights by retaliating against him for his protected speech activities.” *Pratt*, 65 F.3d at 806 (emphasis in original). Retaliation claims must be evaluated in light of the deference accorded to prison officials. *Id.* at 807. The inmate bears the burden of pleading and proving the absence of legitimate correctional goals for the alleged retaliatory action. *Id.* at 806; *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). The Ninth Circuit has recognized that “timing can properly be considered as circumstantial evidence of retaliatory intent.” *Pratt*, 65 F.3d at 808.

b. Due Process - a prisoner’s right to transfer

The Due Process Clause does not give inmates a right to be incarcerated in a specific prison. “[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison, if, as is likely, the State has more than one correctional institution....The conviction has sufficiently extinguished the defendant’s liberty interest to empower the State to confine him in *any* of its prisons.” *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (emphasis in original). A “convicted felon does not forfeit all constitutional protection by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect.” *Id.* at 225. However,

the Due Process clause is not triggered by *any* substantial deprivation imposed by prison authorities. *Id.*

c. Analysis

Plaintiff claims he is likely to succeed on the merits because he has produced sufficient “incriminating evidence against defendants” (#27, p. 3). Plaintiff states that there are over 200 inmates who will act as witnesses and eight other inmates who were also sexually harassed by Jenkins. *Id.* Plaintiff argues that this evidence, coupled with the fact that Officer E. Jenkins was able to “resign without prosecution,” is enough to demonstrate that defendant Neven “cover[ed] up a crime.” *Id.* Further, although “plaintiff is housed in a unit that is believed to be general population, [he] is on constant lockdown [similar to] inmates in the hole.” *Id.*

Defendants respond that plaintiff has failed to show a likelihood of success on the merits because the evidence does not demonstrate retaliation and plaintiff has not established that defendants violated his due process rights (#30, p. 9). With regard to plaintiff’s due process allegations, defendants state that “Plaintiff indirectly alleges that his due process rights were violated because he is misclassified as being in the ‘lockdown unit.’” *Id.* However, Due Process rights are derived only from the United States Constitution and state law. The Due Process Clause “does not create a liberty interest in a particular classification for a prisoner” and “Nevada has not created a protected liberty interest in classification hearings.” *Id.* p. 9-10, citing *Moody v. Daggett*, 429 U.S. 78, 88 n. 9 (1976), *Monahan v. Wolff*, 585 F. Supp. 1198, 1201 (D. Nev. 1984). Further, although plaintiff claims he is in the “hole” in ESP, he is actually housed in the General Population unit. *Id.* p. 11. The classification of plaintiff in a lockdown unit in ESP “is a matter left to the discretion of prison officials. An inmate has no right to any particular classification.” *Id.* p. 12. Finally, plaintiff has no Constitutional right to be transferred to a different prison as inmates have no right to be incarcerated at a specific institution, and there is “nothing in the record [to show] that Plaintiff’s classification was not related to a legitimate penological interest.” *Id.* Therefore, “[a]s Plaintiff has no Constitutional Right to be housed in [a] prison of his choosing, Plaintiff is unable to show a violation of his Constitutional Rights, and therefore, is unable to show a likelihood of success on the merits.” *Id.* p. 14.

1 First, with regard to plaintiff's retaliation claim, plaintiff has failed to demonstrate a
2 likelihood of success on the merits. Plaintiff has not offered evidence of retaliatory intent;
3 therefore, he has not established the causation element of retaliation. The evidence shows that
4 plaintiff was transferred to ESP because he was found guilty of assaulting an NDOC employee,
5 not because he accused an officer of sexual harassment. Additionally, plaintiff has not
6 demonstrated the absence of legitimate correctional goals for the alleged retaliatory action.
7 Punishing inmates for violating rules and acting violently toward prison officials advances
8 legitimate correctional goals of safety, security, and order. Further, housing plaintiff or other
9 inmates who have been found guilty of a serious assault charge in a maximum security institution
10 also advances legitimate penological goals of safety and security. Moreover, plaintiff has
11 continually grieved his transfer, and has commenced the instant lawsuit. Therefore, he has not
12 shown that defendants chilled his First Amendment rights.

13 With regard to plaintiff's due process claim, plaintiff has failed to demonstrate that his
14 conditions of confinement violate his due process rights. Plaintiff may be dissatisfied that he is
15 currently housed in a maximum security prison, but he has presented no evidence that the
16 conditions he experiences at ESP create an "atypical and significant hardship in relation to the
17 ordinary incidents of prison life," such that the Due Process Clause would be implicated. *See*
18 *Sandin v. Connor*, 515 U.S. 472, 482 (1995). Further, plaintiff states that he is on "lockdown,"
19 implying that he is still housed in disciplinary segregation. However, plaintiff is no longer in
20 disciplinary segregation. It is unclear if he was housed in disciplinary segregation for a longer
21 period of time than his 360-day sentence; however, plaintiff is housed in general population now.
22 Therefore, any claim to transfer him to general population would be moot. Additionally, plaintiff
23 has no due process right to be transferred to another prison. Therefore, plaintiff has not presented
24 evidence of deliberate indifference and has not demonstrated a likelihood of success on the
25 merits.

26 **2. Irreparable Injury**

27 To obtain a preliminary injunction, plaintiff must offer evidence that he will be irreparably
28 injured without the injunction. *Johnson*, 72 F.3d at 1430. "Courts generally do look at the

1 immediacy of the threatened injury in determining whether to grant preliminary injunctions.”
2 *Privitera v. California Bd. Of Medical Quality Assurance*, 926 F.2d 890, 897 (9th Cir. 1991)
3 *citing Caribbean Marine*, 844 F.2d at 674 (“a plaintiff must *demonstrate* immediate threatened
4 injury as a prerequisite to preliminary injunctive relief”).

5 Plaintiff argues that he will be irreparably harmed without the injunction because he will
6 continue to be housed in “lockdown” (#27, p. 2). Further, defendants have violated his rights by
7 retaliating against him by placing him in disciplinary segregation, which retaliation defendant
8 Neven admitted. *Id.* (“but the admittance of the hearing officer’s decision was deemed
9 ‘retaliation.’”).

10 Defendants contend that the evidence produced in plaintiff’s motion is not sufficient for
11 issuance of a preliminary injunction because plaintiff has not established irreparable injury (#30,
12 p. 4). Defendants argue that plaintiff was properly found guilty of assaulting an NDOC officer,
13 that he was given a fair disciplinary hearing, appropriate sanctions, and the opportunity to appeal.
14 *Id.* The Hearing Officer sanctioned plaintiff two years in disciplinary segregation and a thirty day
15 loss of canteen, telephone, and visitation. *Id.* Defendants state that these sanctions are in
16 accordance with the sentencing guidelines in AR 707. *Id.* Plaintiff appealed the hearing officer’s
17 decision to defendant Warden Neven, who reduced the sanctions against plaintiff. *Id.* Specifically,
18 Warden Neven found: “The Hearing Officer conducted the disciplinary hearing in accordance
19 with AR 707. The Hearing Officer’s decision was based on some evidence; however, the
20 sanctions imposed appear to be excessive.” *Id.* ex. C. Warden Neven reduced plaintiff’s
21 disciplinary segregation to 360 days and removed the thirty-day loss of canteen, telephone, and
22 visitation. *Id.* p. 5. The fact that defendant Neven reduced plaintiff’s sanctions undermines
23 plaintiff’s retaliation claim against Neven. *Id.* Further, Warden Neven did not admit retaliation
24 in his memorandum reducing plaintiff’s sanctions. Rather, the statement plaintiff uses for support
25 is “simply a restatement of the grounds alleged by Plaintiff for appealing the prior disciplinary
26 findings against him.” *Id.* Finally, defendants did not violate plaintiff’s due process rights at the
27 disciplinary hearing, and whether plaintiff believes the charges brought against him to be
28 fabricated is irrelevant to any due process claim. *Id.* p. 6-8. Therefore, “[s]ince Plaintiff cannot

1 establish that Defendants infringed upon his Constitutional Rights as a matter of law, Plaintiff
2 cannot establish that he has suffered irreparable harm.” *Id.* p. 8.

3 Plaintiff has not demonstrated that defendants violated his constitutional rights or that he
4 will suffer an immediate irreparable injury without an injunction. As set forth above, plaintiff has
5 not established that defendants retaliated against him by sentencing him to disciplinary
6 segregation or by transferring him to ESP. It appears that plaintiff received a fair hearing, which
7 complied with the confines of procedural due process, and plaintiff has not presented evidence
8 to suggest otherwise. Further, plaintiff has no due process right to a particular classification or
9 to be housed at a particular prison. It appears that the prison investigated plaintiff’s allegations
10 of sexual harassment against Jenkins and that Jenkins resigned. Moreover, there is no evidence
11 that NDOC officials attempted to “cover-up a crime.” Although the court agrees that plaintiff’s
12 allegations of sexual harassment are alarming and raise cause for concern, it appears that Jenkins
13 no longer works for NDOC, and, therefore, poses no further threat to plaintiff. Plaintiff has failed
14 to demonstrate that he will be irreparably injured without a preliminary injunction.

15 **3. Balance of Hardships and Public Interest**

16 Because the court concludes that plaintiff failed to demonstrate a likelihood of success on
17 the merits and irreparable injury, the court will not address the balance of hardships or public
18 interest elements.

19 **4. Alternative Test**

20 The Ninth Circuit has held that as an alternative to the four traditional equitable criteria
21 for relief through preliminary injunction, plaintiff may prove either (1) probable success on the
22 merits and the possibility of irreparable injury, or (2) that serious questions going to the merits
23 were raised and the balance of hardships tips sharply in his favor. *Southwest Voter Registration*
24 *Educ. Project*, 344 F.3d at 917 (emphasis added). Above the Court concluded that plaintiff has
25 not shown that he can meet the first alternative test – a likelihood of success on the merits and
26 irreparable injury.

27 Regarding the second alternative test, there are not at this time “serious” questions as to
28 plaintiff’s First, Eighth, or Fourteenth Amendment claims. Further, the balance of hardships do

1 not tip “sharply” in plaintiff’s favor; defendants have an interest in maintaining safety and
2 security and in determining where an inmate is housed. Defendants have demonstrated that
3 plaintiff was transferred to ESP in response to a finding that plaintiff assaulted an NDOC
4 employee. Therefore, should plaintiff be transferred to a less secure NDOC institution, the
5 balance of hardships would weigh in favor of defendants. Thus, plaintiff has not met the second
6 alternative test.

7 **III. CONCLUSION**

8 Based on the foregoing and for good cause appearing, the court concludes that plaintiff
9 has not provided evidence to the court that he is likely to succeed on the merits of his First or
10 Fourteenth Amendment claims, nor has he demonstrated he will suffer irreparable harm in the
11 absence of an injunction. As such, the court recommends that plaintiff’s motion for a preliminary
12 injunction (#27) be **DENIED**.

13 The parties are advised:

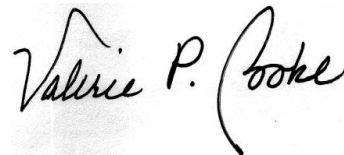
14 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
15 the parties may file specific written objections to this report and recommendation within ten days
16 of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
17 Recommendation” and should be accompanied by points and authorities for consideration by the
18 District Court.

19 2. This report and recommendation is not an appealable order and any notice of appeal
20 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s
21 judgment.

22 **IV. RECOMMENDATION**

23 **IT IS THEREFORE RECOMMENDED** that plaintiff’s motion for a preliminary
24 injunction (#27) be **DENIED**.

25 **DATED:** May 27, 2009.

26 

27 **UNITED STATES MAGISTRATE JUDGE**